* As of May 23, 1994

PRISON EXPOSURE CASES

CASES OF SPECIAL INTEREST

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INTRODUCTION

In this category of cases, nonsmoking inmates typically file suit *pro se* against the warden and other prison officials under civil rights statute 42 U.S.C. § 1983. The inmates allege that exposure to ETS violates the Eighth Amendment to the United States Constitution. The prisoners sometimes also include a claim for violation of the Due Process Clause of the Fifth and Fourteenth Amendments. Typically, the prisoners demand a smoke-free environment. To date, prison exposure cases have produced no court decision banning or restricting smoking.

Because of the U.S. Supreme Court's decision in *Helling v. McKinney*, the category headings for the cases that follow are different than in other sections of this overview. A summary of *Helling v. McKinney* begins this section, followed by Post-*McKinney* "Decisions in Favor of Inmates," "Decisions in Favor of Prison Officials," and "Pending Cases." Then come Pre-*McKinney* "Decisions in Favor of Inmates" and "Decisions in Favor of Prison Officials." We are aware of no prison exposure cases that have been settled.

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U.S. SUPREME COURT

[1] *Helling v. McKinney*, 113 S. Ct. 2475 (6/18/93). [11-12-93]

In a 7-2 opinion, the U.S. Supreme Court gave inmate William McKinney an opportunity to try to prove that Nevada prison authorities have violated the Eighth Amendment to the U.S. Constitution by exposing him to levels of ETS that pose an unreasonable risk to his future health, but the Court made it clear that his burden of proof will be extremely heavy. Further, the Court recognized the official position of the United States Government, as reflected in the *amicus curiae* arguments of the Solicitor General, (i) "that the harm to any particular individual from exposure to ETS is speculative" and (ii) "that exposure to ETS is not contrary to current standards of decency."

The case currently is on remand to the District of Nevada. *McKinney v. Anderson*, 1993 WL 349777 (9th Cir. 9/16/93). The District of Nevada citation is *McKinney v. Anderson*, No. CV-N-87-36-PHA (U.S. District Court, Nevada) (filed 1987). A current status report appears in the "Pending Cases" subsection of Post-*McKinney* cases.

When it remanded the case, the Supreme Court expressed no opinion on whether ETS exposure in fact poses a risk of harm. In the end, the Court simply ruled that McKinney's lawsuit could not be summarily dismissed at a preliminary stage with no chance to prove his claim. "We cannot rule at this juncture that it will be impossible" for McKinney to make his claim, the Court said.

McKinney must now prove not only the objective and subjective elements necessary to find an Eighth Amendment violation, but he also must prove that he is entitled to the specific remedy of an injunction. In order to prevail, McKinney must show four things. First, that he is currently being exposed to "unreasonably high levels of ETS." Second, that the exposure subjects him to "unreasonable risk with respect to his future health." Third, that the risk he complains of is "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." And fourth, that the prison authorities' current attitudes and conduct amount to deliberate indifference to the risk. The Court said "the realities of prison administration" can be taken into account in determining the issue of deliberate indifference.

Emphasizing that a formal smoking policy is now in effect in the Nevada State Prisons, the Supreme Court noted that the policy may make it impossible for McKinney to prove at least two of the required elements of his case: (1) that he is now being exposed to an unreasonable risk to his future health; and (2) that prison authorities are acting with deliberate indifference to the alleged health effects of ETS. "In this respect we note that at oral argument McKinney's counsel was of the view that depending on how the new policy was administered, it could be very difficult to demonstrate that prison authorities are ignoring the possible dangers posed by exposure to ETS," the Court said.

Justice White delivered the Court's opinion, which was joined by Justices Rehnquist, Blackmun, Stevens, O'Connor, Kennedy and Souter. Justice Thomas wrote a dissenting opinion, which was joined by Justice Scalia. Justice Thomas said he would dismiss McKinney's claims as a matter of law and would "reject the claim that exposure to the risk of injury can violate the Eighth Amendment."

The Office of the Solicitor General submitted a brief and participated in oral argument in this case as *amicus curiae* supporting the Nevada prison officials. In characterizing the position taken by the U.S. Government in its arguments, Justice White used these words: "[T]he United States submits that the harm to any particular individual from exposure to ETS is speculative, that the risk is not sufficiently grave to implicate a 'serious medical nee[d],' and that exposure to ETS is not contrary to current standards of decency."

Other reported decisions in the *McKinney* case that preceded the 1993 Supreme Court opinion are as follows: (1) *McKinney v. Anderson*, 959 F.2d 853 (9th Cir. 3/27/93); (2) *Helling v. McKinney*, 116 L. Ed. 2d 236 (U.S. 10/15/91); and (3) *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 2/1/91).

[2] *McKinney v. Anderson*, No. CV-N-87-36-PHA (U.S. District Court, Nevada), *remanded by Helling v. McKinney*, 113 S. Ct. 2475 (U.S. Supreme Court) (decided June 18, 1993). [5-20-94]

According to the docket sheet for this case, plaintiff William McKinney failed to designate expert witnesses for his August 30, 1994 trial by the court-imposed deadline of March 11. The defendants, however, have timely notified

the plaintiff that their expert witness will be Philip Witorsch, M.D.

Although the Supreme Court ruled in its June 1993 opinion that ETS exposure can violate the Eighth Amendment if it poses an unreasonable risk to future health, the Court made it clear that McKinney's burden of proof in this case will be extremely heavy. Specifically, in order to prevail, McKinney must prove that (i) he is currently being exposed to "unreasonably high levels of ETS," (ii) the exposure subjects him to "unreasonable risk with respect to his future health," (iii) the risk he complains of is "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk," and (iv) the prison authorities' current attitudes and conduct amount to deliberate indifference to the risk. He also must prove that he is entitled to the specific remedy of an injunction.

POST-MCKINNEY CASES

DECISIONS IN FAVOR OF INMATES

[1] *Andrews v. Noren*, 1994 U.S. App. LEXIS 4252 (U.S. Court of Appeals, Ninth Circuit) (decided March 2, 1994). [5-20-94]

The Ninth Circuit Court of Appeals has ruled that a former California prison inmate may pursue his claim of cruel and unusual punishment against prison officials for failing to assign him to nonsmoking housing when he allegedly had a demonstrated medical need for such housing. Arthur Douglas Andrews, proceeding pro se, claims that he has bronchial asthma and a chronic heart condition. During the period of his incarceration, August 1989 through July 1992, Andrews spent time in four separate facilities. At three of the facilities, he requested a smoke-free cell and other accommodations of his alleged medical needs. Andrews obtained the accommodations requested at two of the facilities.

Although the court dismissed all of Andrews' other claims of cruel and unusual punishment, the court ruled, on the basis of *McKinney v. Anderson*, 113 S. Ct. 2475 (1993), that further findings were needed to determine whether the defendants were involved in housing decisions and thus could be found to have shown deliberate indifference to his preexisting medical condition by permitting him to be housed with smokers.

[2] *Brown v. Thornburgh*, 1993 U.S. App. LEXIS 26732, No. 93-5527 (6th Cir. 10/12/93). [11-12-93]

The Sixth Circuit Court of Appeals determined that a *pro se* federal prisoner may pursue her claim that she has a medical need for a smoke-free environment and that she is being exposed to high levels of ETS in violation of the Eighth Amendment. Prisoner Shirley Lynn Brown, like Angela Wilson (*see* item *infra*), is incarcerated at a Federal prison in Lexington, Kentucky. The court simply cited *Helling v. McKinney*, 113 S. Ct. 2475 (1993), to support its holding. The case has been remanded for further consideration.

[3] *Gaster v. Campbell*, 1993 U.S. App. LEXIS 22433, No. 93-6605 (4th Cir. 9/2/93). [11-12-93]

Citing *Helling v. McKinney*, the Fourth Circuit Court of Appeals determined that a prisoner should be given the opportunity to litigate his *pro se* claim of cruel and unusual punishment due to ETS exposure. "Although it remains to be seen whether Gaster will be able to meet the subjective and objective elements of *McKinney*," the appellate court stated, "his complaint states a cognizable Eighth Amendment claim."

[4] *Graham v. Gunter*, 9 F.3d 117 (Table), 1993 WL 432565 (10th Cir. 10/27/93). [11-12-93]

The Tenth Circuit Court of Appeals determined that a state prison inmate complaining of ETS exposure had sufficiently alleged personal participation of the defendants in violating his rights; thus the court remanded the case for further proceedings. In his *pro se* complaint, Harold Graham alleged that he had breathing problems and was being housed with a smoking inmate. He later amended the complaint to state that "Defendants have committed battery upon this petitioner [by] exposing petitioner to toxic fumes and vapors." The appellate court concluded that this was an allegation that defendants "willfully forced Mr. Graham to be exposed to environmental tobacco smoke." The court ordered the district court to allow service on the defendants.

[5] *Howell v. Burden*, 1994 U.S. App. LEXIS 957 (U.S. Court of Appeals, Eleventh Circuit) (decided January 21, 1994). [2-11-94]

The Eleventh Circuit Court of Appeals determined that a factfinder should decide whether a prison superintendent can be held liable for the death of an asthmatic inmate allegedly caused by indifference to the inmate's needs for medical treatment, a smoke-free environment and a special diet. The trial court in the case had granted the superintendent's motion for judgment as a matter of law at the close of evidence. Reaching a contrary result, the appeals court found that there was sufficient evidence to permit a jury to reject the superintendent's defense that (i) he had no responsibility for medical care and treatment of prisoners; and (ii) any act or failure to act on his part was not the proximate cause of the prisoner's death.

The evidence at trial reportedly showed that doctors had recommended special treatment for inmate Van Howell, who allegedly suffered from "severe extrinsic asthma" and cardiac arrhythmia with some of his medication. He was allergic to a number of substances that are common in foods and medications, and his condition allegedly was worsened by exposure to ETS, dust and other particulates. The specialists needed to properly treat Howell were not available at the combination prison-hospital facility in which he was incarcerated, and the superintendent did

nothing to seek alternative treatment at any other facility. His dietary and respiratory needs were similarly not met.

The trial court's ruling was reversed, and the case has been remanded for a second time. An earlier appeal in the case determined that the superintendent was not entitled to qualified immunity. The plaintiff in the case is the deceased inmate's widow.

[6] *Johnson v. Laham*, 1993 U.S. App. LEXIS 29528 (U.S. Court of Appeals, Fourth Circuit) (decided October 28, 1993). [2-11-94]

The Fourth Circuit Court of Appeals determined that a Maryland state prison inmate may pursue his Eighth Amendment claim of cruel and unusual punishment due to ETS exposure. The district court had dismissed inmate Steven Johnson's claims, but the Court of Appeals reversed on the basis of *Helling v. McKinney*, 113 S. Ct. 2475 (1993). Under the Supreme Court ruling, Johnson will be entitled to injunctive relief only if he can prove that prison officials were deliberately indifferent to his exposure in failing to enforce the state's inmate smoking policy, and that he is entitled to the specific remedy of an injunction. He must also prove (i) that he is being exposed to unreasonably high levels of ETS, (ii) that the exposure subjects him to unreasonable risk with respect to his future health, and (iii) that today's society will not tolerate his exposure.

[7] *Joyner v. Murray*, No. 92-0908-R (U.S. District Court, Western District, Virginia) (decided March 28, 1994). [5-20-94]

A U.S. district court has determined that a prison inmate who alleged Eighth Amendment violations due to ETS exposure has alleged sufficient facts to permit him to proceed to a hearing on the merits of his claims against a number of prison officials.

Inmate George Joyner claimed that his emotional and physical health had been damaged by high levels of ETS exposure while he was incarcerated in the Virginia Department of Corrections. He allegedly suffers high blood pressure and breathing difficulties when exposed to ETS, and claimed that he repeatedly asked prison officials to house him in nonsmoking areas, to no avail. He also alleged that the problem was compounded by inadequate ventilation. Despite the fact that Joyner is currently housed in a nonsmoking dorm, the court decided that the case was not moot.

In denying the defendants' motion for summary judgment, the court ruled that (i) there were sufficient allegations to support Joyner's claim that he had been exposed to high levels of ETS; (ii) Joyner's submission of a document referring to the EPA's classification of ETS as a Group A carcinogen was sufficient to show that "today's society will not tolerate [Joyner's] exposure to risks of this magnitude"; and (iii) there were sufficient allegations to support Joyner's claim of deliberate indifference due to the defendants alleged refusal to place him in nonsmoking facilities in spite of his constant, medically documented grievances about his problems with ETS.

[8] *LaFountain v. Johnson*, 1993 U.S. App. LEXIS 32213 (U.S. Court of Appeals, Sixth Circuit) (decided December 8, 1993). [2-11-94]

In this unpublished opinion, the Sixth Circuit Court of Appeals determined that a Michigan prison inmate may proceed to litigate a claim that his Eighth and Fourteenth Amendment rights were violated by his exposure to ETS. The inmate, Wayne LaFountain, had alleged that exposure to ETS caused him to suffer sinus-related headaches, watering eyes and troubled breathing. He also alleged that ETS exposure could result in lung disease, heart disease and death. The trial court had dismissed the claim prior to the U.S. Supreme Court's decision in *Helling v. McKinney*, 113 S. Ct. 2475 (1993).

The court of appeals found it questionable that the "present medical needs of the plaintiff are serious enough to state a cause of action." Yet, the court found that LaFountain had "clearly pleaded that his future health was being unreasonably endangered by his forced exposure to ETS and that this exposure was the result of the defendant's deliberate indifference." On this basis, and relying upon *McKinney*, the court determined that LaFountain had stated a cause of action. Although LaFountain had since been transferred to another facility and could no longer pursue his claim for injunctive relief, the court did remand the case to the trial court for a decision on his request for monetary damages.

[9] *Smith v. Scott*, 4 F.3d 994 (Table), 1993 WL 315619 (6th Cir. 8/16/93). [11-12-93]

The Sixth Circuit Court of Appeals ordered a district court to reconsider its dismissal of a class action filed by prisoners who alleged violation of their Eighth and Fourteenth Amendment rights by deliberate exposure to ETS. The appellate court cited the U.S. Supreme Court decision in *Helling v. McKinney* and ordered the lower court to revisit its decision in light of that case. The district court had dismissed *Smith* on the ground that prior law required a prisoner to allege a serious, immediate health threat from ETS exposure in order to state a civil rights claim.

[10] *Thompson v. Lakeland Correctional Facility* (Circuit Court, Michigan). [2-11-94]

According to a press report, Circuit Judge Michael Harrison ordered prison authorities of the Lakeland Correctional Facility near Coldwater, Michigan, to enforce restrictions in a prison smoking policy. The order was reportedly sought by 41-year-old inmate Duane Thompson, who complained that prison officials failed to stop other inmates from smoking in designated nonsmoking areas. Prison officials reportedly said they would comply with the order. *See United Press International*, December 10, 1993.

[11] *Wilson v. Hambrick*, 7 F.3d 237 (Table), 1993 WL 386782 (6th Cir. 9/30/93). [11-12-93]

The Sixth Circuit Court of Appeals permitted a woman incarcerated at a federal prison in Lexington, Kentucky, to pursue her claim that her Eighth Amendment rights are being violated by her exposure to ETS.

Plaintiff Angela Wilson had alleged that the smoking policy at the prison was not being enforced and that she was being housed in a smoke-filled environment with inadequate ventilation. She alleged that ETS caused her to suffer hypertension, sore throat, eye and skin irritation, headaches, coughing and other breathing difficulties. She further alleged that she had been allergic to ETS since childhood and that the prison warden refused her request to move her away from smokers.

Citing *Helling v. McKinney*, the appeals court determined that the U.S. Supreme Court's decision in that case is broad enough to apply to an assertion that a prison smoking policy is not being enforced and ETS "hovers" in the complainant's living area. Accordingly, the court reversed in part a lower court ruling that the complaint was frivolous. The court of appeals dismissed every defendant from the action other than the prison warden, saying that if the facts alleged against the warden were true, Wilson could support her argument that the warden was deliberately indifferent to Wilson's reactions to ETS.

Decisions in Favor of Prison Officials

[1] *Beauchamp v. Sullivan*, 1994 U.S. App. LEXIS 8412 (7th Cir. 4/21/94). [5-20-94]

The Seventh Circuit Court of Appeals has dismissed as frivolous a suit filed by a Wisconsin prison inmate who challenged, on Eighth Amendment and equal protection grounds, the prison's indoor smoking ban. The inmate had failed to allege that he was a smoker; thus, the court found he lacked standing to bring the suit. The inmate also had failed to allege that smoking privileges were removed as "a form of torture by police or guards." According to the court, because the U.S. Supreme Court had said in Helling v. McKinney, 113 S. Ct. 2475 (1993), that prison officials might have a constitutional duty to protect inmates from high levels of ETS, a prison "could hardly be thought to be violating the Constitution by restricting smoking in the manner illustrated by the present case."

[2] *Bogue v. Vaughn*, 1993 U.S. Dist. LEXIS 17058 (E.D. Pa. 12/1/93). [2-11-94]

A district court judge dismissed the claims of five prisoners in a Pennsylvania prison who alleged that their rights were being violated by exposure to ETS. Using the standard set forth by the U.S. Supreme Court in *Helling v. McKinney* and non-ETS prisoner cases, the court found that the defendant had not been deliberately indifferent to the inmates' needs. According to the court, the prison superintendent had every reason to believe that the informal smoking policy at the prison -- which took smoking preference and medical need into account in double celling inmates -- was being followed. The plaintiffs had not shown that the superintendent knew of their inability to obtain cell transfers or about any unique threat to their health from ETS.

The court did, however, dismiss a Rehabilitation Act claim without prejudice, saying that if a plaintiff was precluded from participating in prison activities because a recently adopted smoking policy was not being enforced, he could file a new claim and seek appropriate relief. For summary judgment purposes, the court assumed that one of the plaintiffs was handicapped with a respiratory ailment under the statute but was otherwise qualified to attend activities at the prison.

[3] *Brown v. Costello*, 1993 U.S. Dist. LEXIS 10104, No. 93-CV-149 (N.D.N.Y. 7/15/93). [11-12-93]

The U.S. District Court partially dismissed a prisoner's ETS-related claim for damages against several attorneys and various local and state officials and governing bodies. The complaint alleged, among other matters, that one of the plaintiffs was forced to inhale cigarette smoke in violation of New York Public Health Law § 139-n and that inhalation of ETS constituted denial of due process, trespass and battery.

Finding that the complaint was devoid of any factual allegations against the attorney defendants who had filed a motion for judgment on the pleadings, the court dismissed the complaint as to these defendants and refused the

plaintiffs' untimely request to amend. The claims against the other defendants remain pending.

[4] *Hunt v. Reynolds*, 1993 U.S. App. LEXIS 20701, No. 93-5349 (6th Cir. 8/13/93). [11-12-93]

The Sixth Circuit Court of Appeals denied monetary damages to a prisoner who successfully enjoined officials and employees of the Tennessee Department of Corrections from housing him with smokers. Damages were denied because the inmate did not sue the officials in their individual capacities.

Plaintiff Eanos Earl Hunt, proceeding *pro se*, also attempted to argue to the court that the defendants were not complying with the injunction. The court instructed him to file a motion for compliance or sanctions in the district court regarding this issue.

[5] *Schultz*: Arizona Court of Appeals Affirms Judgment in Case Filed Against Tobacco Distributors. [5-20-94]

On February 24, 1994, the Arizona Court of Appeals affirmed the judgment in favor of the defendants in the last pending case filed by Greg Schultz alleging exposure to environmental tobacco smoke. The defendants were two distributors of tobacco products, the State of Arizona, and the Director of the Department of Corrections. The trial court dismissed plaintiff's complaint on a variety of grounds in August 1992. The court granted motions to quash service filed by the tobacco distributors, whom plaintiff attempted to join in a series of amended complaints. In addition, the trial court denied plaintiff's motion for leave to amend the complaint to add the tobacco distributors as defendants.

Schultz, who filed the case *pro se*, alleged he had several minor physical ailments due to his exposure to environmental tobacco smoke while incarcerated in an Arizona prison. Based on the certificate of service accompanying the February 24, 1994, decision by the Arizona Court of Appeals, it appears Mr. Schultz has been released from prison and is living in St. Louis, Missouri. No manufacturers of tobacco products were ever named as defendants in the instant action. Schultz v. State of Arizona, et al. (Arizona Court of Appeals) (filed May 21, 1991).

[6] *Sutherland v. Overton, et al.*, 1994 U.S. App. LEXIS 9909 (U.S. Court of Appeals, Sixth Circuit) (decided May 2, 1994). [5-20-94]

The Sixth Circuit Court of Appeals has determined that a Michigan prison inmate's Eighth Amendment claims related to ETS exposure were properly dismissed by a district court judge. The inmate, William Sutherland, had alleged that prison and medical officials demonstrated a deliberate indifference to his needs by not placing him in a smoke-free environment. The record in the case indicated, however, that (i) Sutherland's sinus problems were effectively treated with antibiotics; (ii) medical personnel did not prescribe a smoke-free environment for him, but he was placed in a nonsmoking housing unit at his request; and (iii) prison housing officials enforced the smoking prohibition by transferring prisoners who violated the rule.

[7] *Thompson v. Haws*, 1994 U.S. App. LEXIS 72 (7th Cir. 1/4/94). [2-11-94]

The Seventh Circuit Court of Appeals dismissed the *pro se* complaint of an Illinois prison inmate who alleged that his Eighth Amendment rights were being violated by exposure to ETS. The court discussed the U.S. Supreme Court decision in *Helling v. McKinney*, 113 S. Ct. 2475 (1993), but found that inmate James Thompson's complaint fell short of the allegations required by *Helling*. Thompson acknowledged in his complaint that he could avoid the smoke of other prisoners and guards smoking by remaining in his cell. Moreover, appended to Thompson's brief on appeal was a document indicating that the prison responded to his ETS complaints by having them reviewed by a medical doctor, who referred Thompson for psychiatric review. The court held that Thompson's allegations were insufficient to show that the defendants "either established the conditions to inflict wanton pain or are deliberately indifferent to whether the conditions have these effects."

[8] *Voth v. Maass*, 1993 U.S. Dist. LEXIS 9894, No. 93-142-FR (D. Or. 7/2/93). [11-12-93]

Frank Voth, who also filed an action against several cigarette manufacturers, lost his bid to sue prison officials under the Eighth Amendment for, among other matters, assigning him to dormitory housing where smoking is permitted. In denying numerous motions filed by Voth and in granting the defendants' motion for summary judgment, the court observed that Voth did state a section 1983 claim in relation to his allegations about ETS exposure, but disallowed the claim because Voth had been transferred to a nonsmoking dormitory.

SETTLEMENTS

None known.

PENDING CASES

[1] *Brown v. Costello* (U.S. District Court, Northern District, New York) (filing date unknown). [11-12-93]

The complaint alleges, among other matters, that one of the plaintiffs was forced to inhale cigarette smoke in violation of New York Public Health Law § 139-n and that such inhalation of ETS constituted denial of due process, trespass and battery. A pretrial ruling in this case appears in the "Decisions in Favor of Prison Officials" subsection.

[2] *Brown v. Thornburgh*, No. 91-00059 (E.D. Ky.) (filed 1991) (on remand). [11-12-93]

On remand from Sixth Circuit Court of Appeals. That court's decision appears in the "Decisions in Favor of Inmates" subsection.

[3] *Gaster v. Campbell* (D.S.C.) (on remand). [11-12-93]

On remand from Fourth Circuit Court of Appeals. That court's decision appears in the "Decisions in Favor of Inmates" subsection.

[4] *Graham v. Gunter* (D. Colo.) (on remand). [11-12-93]

On remand from the Tenth Circuit Court of Appeals. That court's decision appears in the "Decisions in Favor of Inmates" subsection.

[5] *McKinney v. Anderson*, No. CV-N-87-36-PHA (U.S. District Court, Nevada), *remanded* by *Helling v. McKinney*, 113 S. Ct. 2475 (6/18/93). [2-11-94]

Trial has been set for August 30, 1994, in the District Court of Nevada, which is handling this case on remand from the U.S. Supreme Court. According to the docket sheet for this case, plaintiff William McKinney failed to designate expert witnesses by the court-imposed deadline of March 11. The defendants, however, have timely notified the plaintiff that their expert witness will be Philip Witorsch, M.D.

Although the Supreme Court ruled in its June 1993 opinion that ETS exposure can violate the Eighth Amendment if it poses an unreasonable risk to future health, the Court made it clear that McKinney's burden of proof in this case will be extremely heavy. Specifically, in order to prevail, McKinney must prove that (i) he is currently being exposed to "unreasonably high levels of ETS," (ii) the exposure subjects him to "unreasonable risk with respect to his future health," (iii) the risk he complains of is "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk," and (iv) the prison authorities' current attitudes and conduct amount to deliberate indifference to the risk.

[6] *Rogers v. Romer*, 93-CV-1876 (U.S. District Court, Denver, Colorado) (filed September 8, 1993). [11-12-93]

A Colorado prison inmate serving a life sentence has filed a *pro se* complaint against the Governor of Colorado and correctional facility officials, alleging that his Eighth Amendment right to be free from cruel and unusual punishment was violated when he was forced to share a double cell with smoking inmates. Inmate Joseph Rogers claims that he was "knowingly placed in a life threatening living environment when he was forced to breath second hand cigarette smoke, a known carcinogen."

Although his current cellmate reportedly is a nonsmoker, Rogers is seeking an order restraining the defendants from placing him in a double-bunk cell with a smoking cellmate, and an order placing him in a single cell. He is also seeking punitive damages against the defendants in the amount of $165,000, and an injunction to prevent retaliatory punishment.

[7] *Smith v. Scott*, No. 89-00114 (W.D. Michigan) (filed 1989; on remand). [11-12-93]

On remand from the Sixth Circuit Court of appeals. That court's decision appears in the "Decisions in Favor of Inmates" subsection.

[8] *Wells v. Wilkinson* (U.S. District Court, Ohio) (filing date unknown). [5-20-94]

According to a press report, an inmate at the London Correctional Institution in Ohio has filed a pro se complaint in U.S. District Court against state and prison officials seeking $6.25 million for exposure to ETS. Inmate James Wells is also reportedly seeking a court order barring prison officials from maintaining an "unsafe prison environment" because of the ETS. According to the complaint, "The smoke is so thick that you can see it

lingering in the common airways like fog." It is not known what injuries Wells has alleged.

A corrections department spokesperson has reportedly refused to comment on the lawsuit but did note that the department is revising its smoking policy. Apparently, the new policy will require each prison in the state to create smoke-free dorms or smoke-free living areas within the dorms. A complete smoking ban, however, is not being contemplated. *See The Plain Dealer*, April 8, 1994.

[9] *Wilson v. Hambrick*, No. 92-00287 (E.D. Kentucky) (filed 1992; on remand). [11-12-93]

On remand from Sixth Circuit Court of Appeals. That court's decision appears in the "Decisions in Favor of Inmates" subsection.

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PRE-MCKINNEY CASES

DECISIONS IN FAVOR OF INMATES

[1] *Avery v. Powell*, 695 F. Supp. 632 (D.N.H. 1988). [11-12-93]

The court concluded that "tobacco smoke may be a harmful and possibly lethal indoor pollutant, based on the 1986 Surgeon General's Report and various federal and state regulations pertaining to smoking in public places." 695 F. Supp. at 640.

[2] *Franklin v. State of Oregon*, 662 F.2d 1337 (9th Cir. 1981). [11-12-93]

The court held it improper for a district court to dismiss *sua sponte* an action in which an inmate contended that placing him in a cell with a heavy smoker of cigarettes caused serious danger to his health because of a throat tumor. The court said the prisoner "arguably alleged cruel and unusual punishment under the Eighth Amendment." The inmate also alleged instances of cruel and unusual punishment unrelated to ETS.

[3] *Griffin v. Jones*, 881 F.2d 1082 (Table) (8th Cir. 1989). [11-12-93]

In 1988, four inmates filed suit to obtain an injunction to prevent the Department of Corrections from housing nonsmokers with smokers. Ten days after the complaint was filed, the trial court judge denied process, stating that the plaintiffs had failed to allege actions or conditions amounting to the deprivation of a right, privilege or immunity secured by the Constitution or laws of the United States. In an unpublished opinion, the Eighth Circuit reversed and remanded.

[4] *Hunt v. Reynolds*, 974 F.2d 734 (6th Cir. 9/10/92). [11-12-93]

The Sixth Circuit Court of Appeals reversed a summary judgment order dismissing the claims of two Tennessee inmates who sought monetary and injunctive relief for being compelled to share a cell with a smoker.

Inmate Hunt is 63 and allegedly suffers from seizure disorder, pulmonary disease, unstable angina, coronary artery disease, triple vessel disease and peptic ulcer disease. Inmate Jones allegedly suffers from heart disease. Both claim that exposure to ETS has aggravated their pre-existing medical conditions.

Because the district court had not considered the severity of the inmates' medical conditions, the Court of Appeals could not determine whether they were entitled to the removal of smoking cellmates as part of their medical treatment. The case was remanded "for determination of whether the impact of ETS on the plaintiffs' medical conditions is sufficiently serious to satisfy the objective component of the Eighth Amendment." Neither court considered the subjective component, i.e., whether the defendants acted with deliberate indifference.

[5] *Jensen v. Gunter*, 807 F. Supp. 1463 (D. Neb. 6/11/92). [11-12-93]

A U.S. Magistrate Judge determined that Eighth Amendment rights were violated, in minor part, by prison practices involving double celling of smokers with nonsmokers that led to tensions creating an increased risk of violence. The case was a class action filed by all of the inmates housed or to be housed in the four main housing units of the Nebraska State Penitentiary. The court ordered the defendants to develop a policy which would better classify prisoners who were to be double celled to prevent violence and protect inmates who receive threats.

[6] *Smith v. Brown*, 940 F.2d 662 (6th Cir.) (decided 8/9/91). [11-12-93]

Plaintiffs claimed that they had experienced health problems, including respiratory difficulties and eye irritation, due to ETS exposure.

The trial court granted defendants' motion to dismiss for failure to state a claim. The Sixth Circuit reversed Judge Bell's dismissal and remanded the case to the District Court. The Sixth Circuit held that plaintiffs are entitled to prove that involuntary ETS exposure violates evolving standards of decency under the Eighth and Fourteenth Amendments.

[7] *Wood v. Goldschmidt* 962 F.2d 16 (Table), 1992 WL 98794 (9th Cir. 5/8/92). [11-12-93]

The Ninth Circuit upheld an ETS claim filed by a prisoner and remanded the case to the district court to permit the prisoner to present evidence of (i) the level and degree of his exposure to ETS and (ii) whether prison officials showed deliberate indifference with respect to the exposure.

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Decisions in Favor of Prison Officials

[1] *Beeson v. Johnson*, 668 F. Supp. 498 (E.D.N.C. 1987), *rev'd* without opinion, *Beeson v. Johnson*, 894 F.2d 401 (4th Cir. 1990). [11-12-93]

Plaintiff Beeson had sought assignment to a smoke-free facility, claiming that exposure to ETS aggravated his conditions of asthma, chronic rhinitis and sinus trouble. Beeson alleged that he had developed these symptoms while he was a smoker. He quit smoking in 1976, approximately 10 years before filing suit.

In 1987, the trial court denied defendant's motion to dismiss or for summary judgment, stating that there were genuine issues of material fact as to whether Mr. Beeson had a serious medical condition and whether prison officials had been deliberately indifferent to that condition. The court also stated, however, that there is no constitutional right to be housed in a smoke-free environment. The Fourth Circuit reversed the district court's holding, however, without opinion.

[2] *Bratcher v. Morris*, 1991 U.S. App. LEXIS 7022, No. 90-3325 (6th Cir. 1991). [11-12-93]

Inmate alleged that he had a chronic heart condition which had been worsened by exposure to smoke from cigarettes, cigars and pipes used by other inmates. He further asserted that he unsuccessfully tried to be assigned with a nonsmoking inmate and that defendants made no attempt to segregate smokers and nonsmokers.

The district court granted defendant's motion for summary judgment, concluding that "Bratcher's claim of an Eighth Amendment violation lacks an arguable basis in law because society's evolving standards of decency regarding the propriety of nonsmoking areas and a smoke-free environment have not progressed to the point at which Plaintiff may maintain a Section 1983 civil rights action." The Sixth Circuit affirmed, stating that an unpublished per curiam opinion in *Martin v. Mason*, No. 89-1742, slip op. (6th Cir. Feb. 13, 1989) is dispositive of the issue.

[3] *Brigaerts v. Cardoza*, 1993 U.S. Dist. LEXIS 3925, No. C-90-0300-CAL (N.D. Cal. 3/19/93). [11-12-93]

The court granted defendants' motion for summary judgment giving these reasons: Brigaerts had failed to claim that he suffered any harm from ETS exposure or from allegedly inadequate ventilation; the defendants showed that Brigaerts "did not alert anyone to any irritation that he might have been experiencing due to cigarette smoke"; and the ventilation system was functioning adequately.

[4] *Burns v. Hatcher* (United States District Court, Nevada) (decided November 18, 1991). [11-12-93]

Inmates of a Nevada penitentiary filed a class action complaint challenging a variety of conditions at the prison, including the adequacy of ventilation, and alleging that ETS levels in the prison constituted cruel and unusual punishment in violation of the Eighth Amendment. The trial court entered a defense judgment holding "that inmates . . . who do not smoke are not subjected to harmful levels of environmental tobacco smoke and that the amount of outside air is sufficient to dilute the level of indoor contaminants experienced by inmates in the various housing units."

[5] *Burns v. Sumner*, 1993 U.S. App. LEXIS 12877, No. 91-16931 (9th Cir. 5/21/93). [11-12-93]

The Ninth Circuit Court of Appeals dismissed a class action complaint which alleged, among other matters, that prisoners' Eighth Amendment rights were violated by exposure to ETS. During a bench trial, prisoners at the Southern Nevada Correctional Center presented expert testimony about the risks of ETS, but there was, according to the court, no "evidence that the levels at the prison endangered inmates." The case was remanded in part to determine reasonable attorneys' fees, because the class action had been a catalyst for some prison improvements involving fire protection.

[6] *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C. 1/25/90), *aff'd*, 923 F.2d 200 (D.C. Cir. 10/24/90) (Table, Text in WESTLAW, No. 90-5093), *cert. denied*, 112 S. Ct. 295 (10/15/91). [11-12-93]

The Supreme Court denied certiorari to an inmate who had been unsuccessful at the district court and circuit court levels. None of the justices voted to grant certiorari.

Inmate Caldwell sought an injunction and declaratory judgment for defendants' alleged violation of due process, equal protection, and the Eighth Amendment. The district court's order granting defendant's motion to dismiss contained language favorable to the tobacco industry. The court made the following statements: (i) "contemporary society has yet to view exposure to second-hand smoke as transgressing its broad and idealistic concepts of dignity, civilized standards, humanity and decency" (citation omitted); (ii) "only now is society at large debating whether smoking should be permitted in public areas, the workplace or on common carriers"; (iii) the defendant's failure to constantly segregate smokers from nonsmokers and, "certainly," the inmate's occasional exposure to smoke drifting over from designated smoking areas do not violate the Eighth Amendment; (iv) exposure to "passive smoke" does not trigger the protections of the due process clause or the equal protection clause; (v) the Federal Bureau of Prisons' smoking policy did not create a liberty interest to a smoke-free prison term, but simply means that a warden may implement a smoking policy at his discretion; and (vi) "smoking is a societal issue best resolved by the executive and legislative branches of government."

The District of Columbia Circuit affirmed summarily. The Solicitor General filed a brief in opposition to plaintiff's petition for certiorari on behalf of the Federal Bureau of Prisons, arguing that the bureau's regulations allowing inmates to select nonsmoking cells are adequate.

[7] *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 2/14/92). [11-12-93]

On rehearing, the full panel of the Tenth Circuit vacated an earlier, panel decision (*Clemmons I*) and affirmed the district court's summary judgment for defendant. The full court stated that "the record reveals absolutely no evidence that Clemmons's health has been adversely affected by the cigarette smoke produced by his cellmate."

The plaintiff claimed that he suffered shortness of breath and irritation to his throat, eyes, and nose, but the court held that these symptoms, by themselves, were not enough to establish a constitutional violation. The court refused to consider plaintiff's claims that exposure to ETS may lead to more serious health problems. The court said that "to share a cell with a smoker" does not rise to the level of an Eighth Amendment violation.

The court also said, however, that if plaintiff had shown that defendants had forced him to cell with a smoker, and that they did so "intentionally," knowing the smoke would have "serious medical consequences" for him, the result might be different. In this case, however, the court found defendants had made "reasonable efforts to accommodate plaintiff's needs."

The cite for Clemmons I is 918 F.2d 858 (10th Cir. 10/9/90). The dissenting judge in *Clemmons I*, Judge Deanell Tacha, wrote the majority opinion in *Clemmons II*.

[8] *Cookish v. Commissioner, New Hampshire Department of Corrections* (District Court, District of New Hampshire) (decided January 6, 1993). [11-12-93]

The court dismissed this action, stating the plaintiff had "voluntarily escaped" from prison and had therefore abandoned the opportunity to prosecute his civil claims. Plaintiff's current whereabouts are apparently unknown, and he had missed several court filing deadlines.

[9] *Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989). [11-12-93]

The District Court held that exposure to ETS does not implicate the Eighth Amendment because "society cannot yet completely agree on the propriety of nonsmoking areas." The inmate had been released from prison in early 1985, and was thus limited to damages occurring prior to that time. The Court noted that the inmate had not alleged that exposure to ETS "exacerbated a previously diagnosed serious medical condition. This Court believes that smoking is a societal issue best resolved by the executive and legislative branches of government."

[10] *Grant v. Coughlin*, 1992 WL 142037 (S.D.N.Y. 6/9/92). [11-12-93]

The court dismissed prisoner Joel Grant's second amended complaint, which included allegations regarding exposure to ETS.

Grant had alleged that he was confined to dormitory housing in which 50 percent of the inmates are smokers. He never requested alternative housing, and his physical complaints were limited to severe irritation of his throat and lungs and subjection to "an unreasonable risk of serious medical harm."

In dismissing his complaint, the court cited *Wilson v. Seiter*, 111 S. Ct. 2321 (1991) and its requirement that a prisoner establish that prison personnel were deliberately indifferent to his serious medical needs. The court ruled that it was clear from Grant's complaint that the defendants herein were not even aware of Grant's alleged

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condition, and that an alleged "irritation" and "risk" of harm did not rise to the level of a serious medical condition required for a constitutional violation.

[11] *Griffin v. Jones* (U.S. District Court, Eastern District, Missouri). [11-12-93]

The court granted defendants' motion for summary judgment holding that, under the deliberate indifference standard, the defendant's failure to house plaintiff in a cell with a nonsmoker did not constitute a violation of the Eighth Amendment.

[12] *Hemphill v. Gomez*, 1992 U.S. Dist. LEXIS 20031, No. C-91-3216 SBA (N.D. Cal. 12/8/92). [11-12-93]

The court dismissed the claims made by nonsmoking state prison inmates who alleged violations of constitutional rights after prison officials failed to honor their cell change requests. The inmates had styled their action as a "class action" suit and had sought damages of $175,000.

The court, however, dismissed the action without prejudice to allow plaintiffs to allege that the "defendants as supervisors failed to properly train or supervise personnel, resulting in the harm to plaintiffs; or that defendants had an official policy or custom which resulted in the harm; or that defendants knew of the alleged misconduct and failed to act to prevent the misconduct." The plaintiffs were given 30 days in which to amend their complaint.

[13] *Holley v. Robinson*, 945 F.2d 398 (United States Court of Appeals, Fourth Circuit) (decided October 1, 1991). [11-12-93]

The court found that the doctrine of qualified immunity prohibited suit against prison officials and therefore affirmed the district court's grant of summary judgment in favor of defendants. While the Fourth Circuit withheld opinion on the merits of Holley's ETS claims, it did note that *Caldwell*, *Gorman* and *Avery* (all ETS prisoner cases) found that ETS exposure does not violate the Eighth Amendment.

[14] *Johnson v. Moore*, 926 F.2d 921 (9th Cir. February 28, 1991). [11-12-93]

This case highlights the importance of accommodation in defeating an Eighth Amendment claim.

The prisoner complained because he was double-celled with a smoker. The court rejected the prisoner's claim as "meritless" because "[d]espite a lack of medical substantiation for his claimed allergy, the prison authorities responded to Johnson's request by placing him in a single cell where he would not be exposed to a cellmate's smoking. Accordingly, there has been no showing of deliberate indifference to Johnson's needs as is required to establish an Eighth Amendment violation." (Single quotation marks omitted.)

[15] *Melendez v. Cunningham*, 1992 U.S. App. Lexis 23574, No. 91-1950 (1st Cir. 9/10/92). [11-12-93]

Inmate Orlando Melendez alleged that his repeated requests to be housed with nonsmokers had been denied in violation of the New Hampshire Department of Corrections Policy and Procedure Directive. This directive prohibits smoking in enclosed areas of the state prison except in designated smoking areas. He claimed that the smoking of his cellmates aggravated his allergies and sinus problems. The Magistrate determined that Melendez had failed to state a cause of action in that the complaint lacked the requisite details as to the time, degree and nature of the offending exposure. The amended complaint filed was similarly deficient and was dismissed. The district court approved this dismissal, and the court of appeals affirmed.

The court determined that the aggravation of sinus and allergy problems, without more, appeared to be "no more than de minimis for Eighth Amendment purposes," regardless of the outcome of *Helling v. McKinney*. In so ruling, the court also determined that Melendez could not attempt to enforce a state directive in a § 1983 action because the Directive does not create any substantive rights, privileges or immunities under the U.S. Constitution.

[16] *Mott v. State of Indiana*, 1992 U.S. App. Lexis 14079, No. 91-2141 (7th Cir. 6/9/92). [11-12-93]

Reinforcing its 1991 decision in *Steading v. Thompson*, *infra*, the Seventh Circuit held that the failure of prison officials to designate nonsmoking living quarters does not violate the Eighth Amendment proscription against cruel and unusual punishment. "Like the plaintiff in *Steading*, Mr. Mott does not allege that the defendants are indifferent to his own serious medical needs, but instead that they are indifferent to the generalized harms of second-hand smoke. This does not establish the 'punishment' that the Eighth Amendment forbids," the court stated.

Rejecting plaintiff's due process claims, the court further found that prisoners cannot establish a protected liberty interest in being free from ETS.

[17] *Murphy v. Dowd*, 975 F.2d 435 (8th Cir. 8/28/92), *cert. denied*, 113 S. Ct. 1310 (1993). [11-12-93]

The district court had ruled that Murphy's claims for injunctive relief were moot, because he had been transferred. With regard to Murphy's claim for monetary damages, the court ruled that i) the Fourteenth Amendment claim could not be separately maintained because it was subsumed in the Eighth Amendment claim, and ii) Dowd was entitled to qualified immunity because "the contours of the right [to be free from ETS are not] sufficiently clear" and "the unlawfulness of denying someone the right to be free from ETS is not apparent."

The appeals court, citing the divided circuit court opinions on the subject of prisoner ETS exposure, agreed that housing an inmate with a smoking cellmate in 1988 did not expose superintendent Dowd to liability.

[18] *Randolph v. Mitchell*, 701 F.2d 167 (Table) (4th Cir. 1983), affirming C.A. No. 82-0335-R (E.D. Va. 1982). [11-12-93]

Plaintiff reportedly claimed that the prison authorities did not adequately respond to his hypersensitivity to tobacco smoke. The trial court found that it was unlikely that the inmate could demonstrate that he had a serious medical need because there was no medical test which could demonstrate hypersensitivity to smoke and, moreover, as defendants had done all that they could "under the circumstances," they had vitiated a claim of deliberate indifference. Accordingly, the district court granted the defendants' motion for summary judgment. The Fourth Circuit affirmed in an unpublished opinion.

[19] *Smith-Bey v. Vaughn*, No. 89-4679 (E.D. Pa. April 12, 1991). [11-12-93]

The court rejected the claims of a state prisoner who argued that the refusal of prison officials to provide him with a smoke-free environment constituted cruel and unusual punishment. The prisoner alleged that he was asthmatic and that the prison's refusal to provide him with smoke-free living conditions constituted deliberate indifference to his medical needs. According to one news report, the most damaging evidence to the inmate's ETS claim was that he testified that the stress of confinement induced him to smoke occasionally.

[20] *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 8/19/91), *cert. denied*, 112 S. Ct. 1206 (2/24/92). [11-12-93]

An inmate initiated this case as a class action on behalf of all inmates, seeking to eliminate tobacco from Illinois prisons or at least to require the establishment of nonsmoking buildings.

The Seventh Circuit dismissed the inmate's complaint for failure to state a claim upon which relief can be granted. The court found that the inmate had failed the test established by the Supreme Court in *Wilson v. Seiter*. The opinion recognized the role which ventilation plays in the ETS controversy and the need for prison officials to consider the interests of smokers and nonsmokers.

> Secondary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest of the world. No one supposes that restaurateurs who allow smoking are subjecting their other patrons to 'punishment,' or desire to harm them. The guards and administrators who breathe smoky air in the prison are not punishing themselves. No one would suppose, either, that the gentlemen tobacco farmers who wrote and adopted the Eighth Amendment could have conceived of smoke as punishment. Debate persists about how severe the effects of secondary smoke may be. The effects differ with the nature of the environment (particularly with the effectiveness of ventilation), and are at all events considerably smaller than the effects experienced by the smokers themselves.
>
> In deciding whether to allow smoking in prison, public officials properly consider both the effects of smoke on non-smokers and the effects of a ban on those who desire this Faustian pleasure. Wardens who resolve the conflict in favor of the inmates who want to smoke could not plausibly be accused of reaching this decision because they hope the smoke will injure other prisoners.

The court also cautioned, however, that prisoners who can attribute serious medical conditions to smoke "are entitled to appropriate medical treatment, which may include removal from places where smoke hovers."

[21] *Steele v. Trigg* (U.S. Court of Appeals, Seventh Circuit) (decided November 3, 1992). [11-12-93]

The Seventh Circuit Court of Appeals has dismissed the *pro se* complaint filed by an Indiana Youth Center prisoner who sought injunctive relief and $1 million in damages for, among other matters, failure of prison officials to provide a smoke-free atmosphere.

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The court stated plaintiff failed to allege aggravation of an existing, serious medical condition or an "allergic reaction to ETS." Nor did Steele claim deliberate indifference on the part of prison officials in his complaint. Thus, the appeals court affirmed the district court's dismissal of the complaint with prejudice.

[22] *West v. Wright*, 747 F. Supp. 329 (E.D. Va. 9/28/90), remanded to determine timeliness of filing notice of appeal, 932 F.2d 964 (Table, text in WESTLAW, No. 90-7394) (5/15/91). [11-12-93]

The court granted defendant summary judgment, stating: "[W]here Plaintiff does not suffer from any preexisting medical condition that is aggravated by environmental tobacco smoke, and where Defendants have implemented significant safeguards to protect nonsmokers from environmental tobacco smoke, the factual circumstances do not support a claim of cruel and unusual punishment."

The defendants in *West* had implemented significant safeguards for protection of nonsmokers, including the opportunity to be assigned to a nonsmoking cell with a fan, output and input vents, and a window that could be opened. *West* also noted that while the officials at the facility in which Plaintiff was housed were "adequately accommodating both smokers and nonsmokers, the physical plans of other prisons may not permit such an accommodation. In such circumstances, a total ban on smoking may be appropriate."

[23] *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir. 1989). [11-12-93]

The Fifth Circuit dismissed the inmate's complaint as frivolous on the ground that the complaint duplicated the allegations raised and litigated in a prior suit, *Wilson v. Estelle*, Civ. No. H80-1029 (Southern Dist. of Texas, September 20, 1983). Although Plaintiff characterized his injuries somewhat differently in the second case, the Fifth Circuit agreed with the district court that the cases presented virtually identical causes of action. The court further stated that the 1986 Surgeon General's Report on the effects of ETS did not constitute a new legal situation which would allow for relitigation of Plaintiff's request for smoke-free confinement.

SETTLEMENTS

None known.

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